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In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, PETITIONER

v.

HOME TITLE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in this cause on June 8, 1931 (R. 135), reversing the judgment of the District Court for the Eastern District of New York (R. 43–54).

QUESTION PRESENTED

Whether the provisions of Section 246 of the Revenue Acts of 1921 and 1924, providing a special basis for the taxation "of every insurance company

(other than a life or mutual insurance company)" may be availed of by a corporation doing a mortgage guaranty and title insurance business.

STATUTES INVOLVED

These are set out in the Appendix, pp. 11–14, *infra*.

STATEMENT

The respondent, a New York corporation, paid the capital-stock tax imposed upon domestic corporations by Sections 1000 (a) (1) of the Revenue Act of 1921 and by Section 700 (a) (1) of the Revenue Act of 1924, pp. 11, 13, *infra*, for the fiscal years ending June 30, 1923, June 30, 1924, and June 30, 1925. (R. 25, 26, 27.) Subsequently it filed claims for refund of such taxes on the ground that it was an "insurance company" and therefore liable only for the tax imposed by Section 246 (a) (1) of those Acts, pp. 11, 13, *infra*. These claims were rejected (R. 25, 26, 27), whereupon the respondent brought this suit in the District Court (R. 3–13). The case was tried upon stipulated facts, without a jury. (R. 24.)

The respondent is a corporation organized in 1906 under Article V of the Insurance Law of New York relating to title and credit guarantee corporations (Laws 1892, c. 690). As such it has been, and now is, subject to supervision by the State Superintendent of Insurance, to whom it makes annual reports. (R. 25, 27–28.)

The respondent's business since its organization has consisted of the insurance of titles to real estate and the sale of real-estate mortgages guaranteed by itself. (R. 33, 35.) Its mortgage guaranty business was and is carried on as follows: It receives applications for loans secured by first mortgages on real estate. On receiving such an application the respondent makes an appraisal of the security and a search of the title. If these preliminary matters are satisfactory, the respondent prepares and the applicant executes a bond and mortgage. Thereupon the face amount of the loan is paid by the respondent to the applicant, less charges for the appraisal, inspection, and other services rendered, and for recording, and less a fee for title insurance, which is always made a condition of the granting of the loan. (R. 34–35, 38.) Thereafter the bond and mortgage, or certificates of participation therein, are sold or assigned to investors, ostensibly for their face value. When a bond and mortgage are sold the respondent delivers to the investor a "Mortgage Guarantee," called a "policy." (Exhibit N, R. 92–95.) In the case of the sale of a participation certificate (Exhibit O, R. 96–98), there is incorporated in the certificate itself terms corresponding substantially with those in the "Mortgage Guarantee." By the "guarantee," or participation certificate, the purchaser or investor appoints the respondent as his agent to collect the principal and interest on the

bond and mortgage. The respondent guarantees payment of the principal as soon as collected, but in any event within twelve months after the same becomes due, and payment of interest at a specified rate, which is usually one-half of one per cent less than the rate specified in the bond. This difference, called a "premium," is retained by respondent and constitutes the consideration for the sale of the mortgage and its accompanying guaranty, or of the certificate. (R. 35–36, 92–98.)

The respondent does not make loans for its own investment primarily, but for the purpose of ultimate transfer to the general public. In making assignments of bonds and mortgages or of fractional certificates the respondent always enters into the guaranty described. The average length of time between the making of the loans and their subsequent transfer to investors is approximately two months. The interest earned in the intervening period is part of respondent's gross income. (R. 36.)

In conducting its business respondent did not segregate its assets but used them indiscriminately in all its activities. It always kept on hand a sufficient quantity of its bonds and mortgages to maintain the guaranty fund supposedly required by Article V of the New York Insurance Law. (R. 40–41.)

By the law of New York corporations organized under its banking statutes and subject to super-

vision by the State Banking Department may be authorized to do a mortgage guaranty business like that of respondent. During 1921 to 1925, inclusive, at least two companies thus organized and supervised were so engaged. (R. 41–42.)

The District Court held that the respondent was not an "insurance company" within the meaning of Section 246 of the Revenue Acts of 1921 and 1924 and directed judgment in favor of the United States. (R. 54.) Upon appeal to the Circuit Court of Appeals the judgment was reversed. (R. 135.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the respondent was taxable as an "insurance company" under Section 246 of the Revenue Acts of 1921 and 1924.

2. The Circuit Court of Appeals erred in not holding that the respondent was taxable under Sections 230 and 1000 of the Revenue Act of 1921 and Sections 230 and 700 of the Revenue Act of 1924.

REASONS FOR GRANTING THE WRIT

On the same day it decided this case the Circuit Court of Appeals handed down its decision in *Lawyers Mortgage Company* v. *Bowers,* 50 F. (2d) 104, No. —, present term, in which case a petition for certiorari is being filed by the Government simultaneously herewith. The instant case and the *Lawyers Mortgage Company* case present substantially the same question and all the reasons for

granting a writ of certiorari set forth in the Government's petition in the latter case are applicable to the instant case.

Wherefore it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1931.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 43–54) is reported in 41 F. (2d) 793. The opinion of the Circuit Court of Appeals (R. 129–135) is reported in 50 F. (2d) 107.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931. (R. 135.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, specification of errors to be urged, and a statement of the case will be found in the petition. The statutes involved are set out in the Appendix, pp. 11–14, *infra*.

ARGUMENT

For reasons set forth in the brief in support of the Government's petition for certiorari in *Bowers* v. *Lawyers Mortgage Company*, No. —, present term, filed simultaneously herewith, we submit that the decision of the Circuit Court of Appeals in the

instant case is erroneous. The only substantial difference between the two cases is that, unlike the taxpayer in the *Lawyers Mortgage Company* case, the respondent here engages in the practice of insuring titles to real estate in addition to the mortgage guaranty business. We do not believe that this difference justifies the decision that the respondent is an insurance company within the meaning of Section 246 of the Revenue Acts of 1921 and 1924.

So far as respondent's policies of title insurance are issued in connection with, and as a part of, transactions of transfer or sale of its mortgages to the general investing public, we submit, for the reasons set forth in the Government's brief in the *Lawyers Mortgage Company* case in respect of the contracts of guaranty there involved, that they are merely terms or conditions incident to the sale of the mortgages. Whatever conditions respondent may see fit to attach to the sale of its mortgages necessarily are subordinate to the sale itself. Viewed from the standpoint of the investor, insurance of the title of the security behind his purchase, like the guaranty of payment of principal and interest, is merely a feature rendering his investment more attractive than would otherwise be the case.

The fact that the respondent issued policies of title insurance on properties not covered by its own mortgages did not bring the company within the

provisions of Section 246. As pointed out in the brief in the *Lawyers Mortgage Company* case, Congress by that section provided for the taxation on a special basis only of those companies engaged in the insurance business all, or substantially all, of whose income consisted of returns from investments and from underwriting premiums. Profits from sales of mortgages do not fall directly within either of these classes. It is not to be presumed that the Congress intended the exemption of such profits in the hands of a corporation also doing an insurance business but not in the hands of another corporation. Exemptions are not read into the law. The only logical interpretation of the statute is that if a corporation engaged in the business of insurance sees fit to engage in other commercial activities it withdraws itself from the provisions of Section 246 and subjects itself to taxation like commercial corporations generally.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals is erroneous. The question presented is one of general importance in the administration of the tax laws and is raised in a large number of cases now pending in the courts and the Bureau of Internal Revenue. Several District Courts have reached a conclusion contrary to that of the Circuit Court of Appeals.

We respectfully submit that the petition should be granted.

THOMAS D. THACHER,
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G. A. YOUNGQUIST,
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HAYNER N. LARSON,
Special Assistants to the Attorney General.
PAUL D. MILLER,
Attorney.

SEPTEMBER, 1931.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 252, 262, 294:

SEC. 1000. (a) That on and after July 1, 1922, in lieu of the tax imposed by section 1000 of the Revenue Act of 1918—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(b) The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section * * * 246.

SEC. 246. (a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *

(b) In the case of an insurance company subject to the tax imposed by this section—

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred; * * *.

SEC. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount.

Revenue Act of 1924, c. 234, 43 Stat. 253, 282, 290, 325:

SEC. 700. (a) On and after July 1, 1924, in lieu of the tax imposed by section 1000 of the Revenue Act of 1921—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(b) The taxes imposed by this section shall not apply * * * to any insurance company subject to the tax imposed by section * * * 246. (U. S. C., Title 26, Sec. 223.)

SEC. 246. (a) In lieu of the taxes imposed by sections 230 and 700, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230;

* * * * *

(b) In the case of an insurance company subject to the tax imposed by this section—

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from investment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the Na-

tional Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

(3) The term "investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends and rents received during the taxable year add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred; * * *. (U. S. C., Title 26, Sec. 1006.)

Sec. 230. In lieu of the tax imposed by section 230 of the Revenue Act of 1921 there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax of 12½ per centum of the amount of the net income, in excess of the credits provided in sections 236 and 263. (U. S. C., Title 26, Sec. 981.)

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